Supreme Court, U.S.
FILED
OCT 11 1991
OFFICE OF THE CLERK

(3)

91-525

No. _____

IN THE

Supreme Court of the United States

October Term, 1991

JEROME HOWARD HANOVER,

Petitioner,

v.

ROBERT M. RUCH, M.D.,

Respondent.

Petition For Writ Of Certiorari To The
Supreme Court Of Tennessee, At Jackson

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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A. *Respondent has misstated the assertions of the Petitioner*

At page 1 of his *Response*, Respondent states that *"Petitioner asserts that the Tennessee Supreme Court has given retroactive effect to an act of the Tennessee General Assembly, which it did not."* Respondent is totally incorrect in his synopsis of Petitioner's argument. The correct statement is that Petitioner asserted that the particular decision of the Tennessee Supreme Court at issue violated the due process clause of the United States Constitution because it retroactively took away a vested substantive right of the Petitioner.

At page 2, Respondent states that *"[T]he opinion of the Tennessee Supreme Court made no attempt to give retroactive affect [sic] to legislation. Neither did it seek to make retroactive a change in the state common law."* However, in effect, this is exactly what the opinion of the Tennessee Supreme Court attempts to do! How else can the action or opinion be described. The Tennessee Legislature passed a law on April 12, 1990 abolishing the tort of criminal conversation but specifically decided that this repeal of long-standing law was not to go into effect until January 1, 1991. By its opinion of April 15, 1991, the Tennessee Supreme Court has retroactively abolished a common law that was first

judicially recognized by the Tennessee Supreme Court in Stepp v. Black, 14 Tenn. App. 153 (1931), cert. denied March 5, 1932 and which was subsequently codified in the Tennessee Code Annotated. Thus, the facts are entirely contrary to this above-quoted statement found at the beginning of paragraph one at page 2 of the Respondent's *Response.*

On the last paragraph of page 3, Respondent states that *"[T]he decision below, therefore, does not have to do with retroactive application of law. The Tennessee Supreme Court in effect held that the complaint did not state a claim against the Respondent upon which relief could be granted."*[1] Petitioner would assert that such analysis is contorted. A Rule 12(b)(6) defense for failure to state a claim upon which can be granted is routinely included by defense lawyers in all initial *"answers"* to *"complaints"* for the premise that the complaint fails to state facts which entitle the Plaintiff to relief under the common or statutory law then existing at the time the acts complained of occurred. The only way for such a statement to be true in this case, that is, to say that Respondent Dr. Ruch's conduct did not give rise to a tort

[1] The standard Rule 12(b)(6) defense under the Federal Rules of Civil Procedure. Under the Tennessee Rules of Civil Procedure, the proper cite is Rule 12.02(6).

cause of action on behalf of Petitioner Hanover at the time Dr. Ruch was admittingly committing these acts, is to retroactively apply the law of the Tennessee Legislature passed on April 12, 1990 or the opinion of the Tennessee Supreme Court rendered on April 15, 1991! There is absolutely no other method by which one could give any credence to the rule 12(b)(6) defense in this case except by retroactively abolishing the law of criminal conversation as the Tennessee Supreme Court has done by its decision in the case sub judice. Thus, the statement by counsel for Respondent should read that *only by first giving retroactive application to its decision below, the Tennessee Supreme Court in effect held that the complaint did not state a claim against the Respondent upon which relief could be granted.*

B. Petitioner had no basis for raising any constitutional issue in the state court proceeding until after the Tennessee Supreme Court had rendered its opinion.

Respondent argues that Petitioner waived his right to rely on the constitutional arguments now made before this court because they were not raised before the trial court or the Tennessee Appellate Court or the Tennessee Supreme Court. The law in Tennessee is that a **defendant** waives his right to raise

constitutional issues as a defense if not raised in the lower court. Here, Petitioner had no right or reason to raise any constitutional issues in the lower court because the case proceeded to trial and he obtained a jury verdict on the tort of criminal conversation. Contrary to Respondent's assertion that Petitioner did not raise the issue before the Tennessee Appellate Court or the Tennessee Supreme Court, counsel for Petitioner Hanover did address in the appellate court appellee's brief[2] that it was absurd for Dr. Ruch to ask the appellate court to retroactively abolish the tort for two reasons; one, because the legislature had already addressed this situation by the passage of the law on April 12, 1990, and two, because Mr. Hanover had a vested right in such action. Similar arguments were made to the Tennessee Supreme Court in Mr. Hanover's brief after Dr. Ruch appealed to such court. Mr. Hanover certainly had no reason to address such an issue in the trial court on his behalf at that time. Further, when the Tennessee Supreme Court acted in this case by its opinion released on April 15, 1991 to retroactively abolish the tort of criminal conversation, Mr. Hanover filed a Petition to Rehear, the sole basis of which was that the action by the Tennessee Supreme Court was unconstitutional in that it retroactively did away with his vested

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[2] Mr. Hanover was the appellee in the Tennessee Court of Appeals.

cause of action and subsequent judgment, all of which certainly violated the due process clause of the U.S. Constitution, if not the Tennessee Constitution.

C. *This is not a case of "due process" as suggested by Respondent but rather a case dealing with a violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution.*

Counsel for Petitioner is at a loss to try to understand the logic behind the argument raised by Respondent at "subtitle C" of his *Response,* beginning at page 5 therein. Respondent states that Petitioner was **afforded due process** because his case was permitted to go to trial, and then the case was subsequently reviewed by the Tennessee Appellate Court and the Tennessee Supreme Court, just as any and all other cases filed in the legal system in Tennessee would have been handled! Such analysis is totally missing the thrust of the basis for Petitioner's "due process complaint" in the case sub judice. Then, Respondent states at page 6 that *"rather, (what) Petitioner (really) seeks to (do is to) have this Court find that the decision (of the Tennessee Supreme Court) below was wrong."* Yes, as in any situation where a review is sought, the Petitioner is asking that the higher "court find that the decision (of the lower court) below was wrong." Respondent

suggests that one may not come before this Court asking that the Court find that the decision of the lower state or federal court was wrong!

Thus, apparently, Respondent is suggesting that the argument concerning lack of "due process" is limited to situations where persons were not afforded their "day in court!" If so, Respondent has totally misunderstood the legal meaning of a violation of the due process clause of the U.S. Constitution. The meaning of such was fully addressed by Petitioner in the Petition for Writ of Certiorari. Most probably, Respondent has resorted to such analysis and filed a *Response* totally devoid of any substantive argument to counter those raised by Petitioner in the Petition for Writ of Certiorari for one reason. Counsel for Respondent apparently realizes that the action taken by the Tennessee Supreme Court in this case was indeed totally violative of the **Fourteenth Amendment to the Constitution of the United States**.

CONCLUSION

For all of the foregoing reasons, Petitioner Jerome Hanover respectfully submits that this Court should grant his Petition, that a writ of certiorari should issue, and that the decision of the Tennessee Supreme Court below should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served 3 copies of the foregoing pleading on all adverse parties and/or their respective attorney(s) of record, Hal Gerber, Attorney at Law, Brinkley Plaza, 80 Monroe Avenue, Suite 410, Memphis, Tennessee 38103, and Deborah Godwin, Attorney at Law, 263 Court Avenue, Memphis, Tennessee 38103, U.S. mail, postage prepaid, this October 11, 1991.

Ira M Thomas

IRA M. THOMAS